No. 05-1124

IN THE

Supreme Court of the United States

JEREMIAH W. (Jay) NIXON,
ATTORNEY GENERAL, STATE OF MISSOURI,
Petitioner,

—v.—

REPRODUCTIVE HEALTH SERVICES OF PLANNED PARENTHOOD OF THE ST. LOUIS REGION, INC., *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Court of Appeals correctly held that the Missouri Infant's Protection Act, Mo. Rev. Stat. § 565.300 (2000), is unconstitutional because it lacks an exception for preservation of the health of the woman.

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INTRODUCTION

Petitioner (State) has petitioned for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit that the Missouri Infant's Protection Act, Mo. Rev. Stat. § 565.300 (2000) (Act), is unconstitutional because it bans certain abortion procedures without making an exception for circumstances when they are necessary for the woman's health. In so ruling, the Court of Appeals faithfully applied this Court's decision in *Stenberg v. Carhart*, 530 U.S. 914 (2000), which held a similar Nebraska law unconstitutional for the same reason.

Although this Court has granted certiorari in *Gonzales v. Carhart*, 413 F.3d 791 (8th Cir. 2005), *cert. granted*, 126 S. Ct. 1314 (U.S. Feb. 21, 2006) (No. 05-380), a case that involves a federal abortion ban that was ruled unconstitutional for lack of a health exception, the question in that case is whether this Court should defer to Congressional fact-finding that contradicts a holding of this Court. Petition for Certiorari at (1), Question Presented, *Gonzales* (U.S. Sep. 23, 2005) (No. 05-380). There is no such fact-finding by the legislature in regard to the Act and therefore no such novel issue for the Court to decide.

Moreover, this case involves no undecided issues relating to standard of review, scope of relief, or the application of the principles announced by this Court earlier this term in *Ayotte v. Planned Parenthood of Northern New England*, 126 S. Ct. 961 (2006). *Ayotte* held that in a case such as this one, where a statute lacks a constitutionally required health exception, the issue of whether to invalidate the entire statute or only its unconstitutional applications depends on an assessment of legislative intent in combination with other factors, such as

the proper role of the judiciary in ameliorating constitutional defects. *Id.* at 967-69. In this case, that assessment has already been made by the Missouri Court of Appeals, which declined to read a health exception into the Act even to save it from constitutional invalidation by the federal courts. *State v. Reprod. Health Servs. of Planned Parenthood of the St. Louis Region*, 97 S.W.3d 54 (Mo. Ct. App. 2002), *transfer to Mo. Supreme Court denied* (Mar. 4, 2003), Appendix to Petition for Writ of Certiorari (Pet. App.), A-15–A-33.

Thus, this case presents no unsettled issue of federal law, no conflict among the federal courts of appeals and no conflict with prior decisions of this Court, the usual compelling reasons that would lead this Court to grant certiorari. S.Ct. Rule 10. Therefore, this Petition should be denied.

However, Respondents (Reproductive Health) recognize that the Court's ultimate decision in *Gonzales* may be relevant to the validity of the Court of Appeals decision in this case. Therefore, if the Court does not deny the Petition, Reproductive Health requests that the Court hold it in abeyance until it has decided *Gonzales* and then provide Reproductive Health an opportunity to submit a supplemental brief pursuant to S.Ct. Rule 15.8 on whether the Court should grant or deny certiorari in this case.[1]

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[1] Reproductive Health raised an additional claim on which no court has ruled as yet: that the Act's exception to protect a woman's life, which requires that the physician use procedures "consistent with the usual and customary standards of medical practice," Mo. Rev. Stat. § 565.300.5, unconstitutionally burdens a woman's constitutional right to choose abortion. In the event this Court vacates or reverses the Court of Appeals ruling in this case, Reproductive Health reserves its right to advance this claim in the lower courts.

STATEMENT OF THE CASE

The Act, passed in 1999, creates the crime of "infanticide," which is defined as causing the death of a "living infant with the purpose to cause said death by an overt act performed when the infant is partially born or born." Mo. Rev. Stat. § 565.300.3 (2000). The only exception to the Act's ban is for procedures "consistent with the usual and customary standards of medical practice to save the life of the mother during pregnancy or birth . . . ." *Id.* at § 565.300.5.

Soon after Reproductive Health filed this case in federal court, Petitioner sued it in state court seeking a construction of the Act. As a result of that litigation, the Missouri Court of Appeals held that the Act bans certain "intact dilation . . . and evacuation abortion procedure[s] . . . , including the procedure known as an intact dilation . . . and extraction [D&X] . . . ." Pet. App. A-29– A-30.[2] The Missouri Court of Appeals also rejected the State's attempt to interpret section 8 of the Act[3] to allow a physician to assert a defense to prosecution that the abortion procedure was necessary to protect the woman's health. The Missouri court said such an interpretation did not comport with legislative intent and would entangle courts impermissibly in the task of revising legislation. Pet. App. A-28.

After the proceedings in state court, the case returned to federal court where the district court granted summary judgment to Reproductive Health, holding the Act unconstitutional because it did not have a health excep-

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[2] The state trial court had found that the Act did not otherwise ban dilatation and evacuation (D&E) abortions. Pet. App. A-23.

[3] That section provides in pertinent part that nothing in the Act "shall be interpreted to exclude the defenses otherwise available to any person under the law . . . ." Mo. Rev. Stat. § 565.300.8 (2000).

tion. *Reprod. Health Servs. of Planned Parenthood of the St. Louis Region v. Nixon*, 325 F. Supp. 2d 991 (W.D. Mo. 2004), Pet. App. A-7–A-14. On appeal, the Court of Appeals for the Eighth Circuit affirmed, finding that this Court's decision in *Stenberg v. Carhart* governed the outcome. *Reprod. Health Servs. of Planned Parenthood of the St. Louis Region v. Nixon*, 429 F.3d 803 (8th Cir. 2005), Pet. App. A-2–A-6.

REASONS FOR DENYING THE WRIT

I. THE COURT OF APPEALS FAITHFULLY APPLIED THE DECISION OF THIS COURT IN *STENBERG V. CARHART*.

This case is governed by this Court's decision in *Stenberg v. Carhart*. In *Stenberg*, this Court considered a law, which, like the Act, banned the D & X procedure.[4] 530 U.S. at 926-30; Pet. App. A-29–A-32 (delineating abortions banned by the Missouri Act). In addition, the Nebraska statute, like the Missouri Act, contained only an exception for procedures necessary to save the woman's life. This Court held that the where "a significant body of medical opinion believes a procedure may bring with it greater safety for some patients and explains the medical reasons supporting that view," the statute must include a health exception for instances when the procedure is "necessary, in appropriate medical judgment for the preservation of the life *or health* of the mother." 530 U.S. at 937 (internal citations omitted)

[4] This Court also ruled that the Nebraska statute at issue in *Stenberg* banned dilatation and evacuation (D&E) procedures and thereby imposed an undue burden on a woman's right to choose abortion. 530 U.S. at 945-56. Given the Missouri Court of Appeals' narrowing construction of the Act, that aspect of the *Stenberg* decision is not at issue here. Pet. App. A-23.

(emphasis added). Finding that a significant body of medical opinion did view the D & X method as safer for some patients, this Court held the Nebraska statute unconstitutional because it contained no exception for preservation of the health of the woman. 530 U.S. at 937-38. Because the Act also lacks such an exception, the Court of Appeals correctly held it unconstitutional as well.

The State asserts that *Stenberg* does not support the result the Court of Appeals reached because *Stenberg* did not provide "admissible evidence on which summary judgment could be based." Petition for Writ of Certiorari (Cert. Pet.) 15. However, the State misconceives the issue. *Stenberg* does not provide "evidence." Rather, it established the legal principle that a ban on D & X abortions must include a health exception because the then existing medical evidence established that a significant body of medical opinion viewed the procedure as safer for some women. In order to succeed in summary judgment, the state must show that new developments have placed in genuine dispute *Stenberg's* underlying factual premise regarding the superior safety of D&X abortions. Pet. App. A-5. This the State failed to do. Pet. App. A-6.[5]

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[5] The Court of Appeals rejected the State's view that each plaintiff that attacks a similar law must prove anew the facts adduced in *Stenberg*. That would lead to the absurd result of different appeals courts and even different district courts within a state reaching different results based on the same factual record already produced in *Stenberg* and found adequate to establish the unconstitutionality of a law that bans D & X abortions without a health exception. Pet. App. A-5; *see also Gonzales*, 413 F.3d at 799-800. Nevertheless, evidence of a significant body of medical opinion that considers D & X abortion safer for some women was introduced by Reproductive Health in support of its motion for summary judgment in the form of Dr. Crist's declaration, attaching the ACOG "Statement on Intact Dilatation and Extraction." *See* Pet. App. A-4. ACOG's opinions also were relied upon by this Court in finding that a significant body of medical opin-

The Court of Appeals decision comports with the decisions of every other court to consider a similar state law in the wake of *Stenberg*, all of which found that *Stenberg* categorically dictated the outcome. *Richmond Med. Ctr. for Women v. Hicks*, 409 F.3d. 619 (4th Cir. 2005), *petition for cert. filed*, 74 U.S.L.W. 3352 (U.S. Dec. 1, 2005) (No. 05-730); *Hope Clinic v. Ryan*, 249 F.3d 603, 604 (7th Cir. 2001) ("[f]or the reasons given in *Stenberg*" the laws banning D & X abortions are unconstitutional); *Causeway Med. Suite v. Foster*, 221 F.3d 811, 812 (5th Cir. 2000), *aff'g* 43 F. Supp. 2d 604 (E.D. La. 1999) ("In the light of the Supreme Court's recent decision in *Stenberg v. Carhart*, the judgment of the district court [invalidating a ban on D & X abortion] is affirmed") (citation omitted); *Richmond Med. Ctr. for Women v. Gilmore*, 219 F.3d 376, 377 (4th Cir. 2000) ("the Court has also now unequivocally held that any ban on [D & X] abortion must include an exception for the health of the mother in order to be constitutional"); *Planned Parenthood of Cent. N.J. v. Farmer*, 220 F.3d 127, 152 (3d Cir. 2000) (Alito, J. concurring) ("under [*Stenberg*], the decision of the District Court [striking D & X ban] must be affirmed"); *WomanCare of Southfield, P.C. v. Granholm*, 143 F. Supp. 2d 849 (E.D. Mich. 2001); *Summit Med. Assoc., P.C. v. Siegelman*, 130 F. Supp. 2d 1307, 1314 (M.D. Ala. 2001); *Daniel v. Underwood*, 102 F. Supp. 2d 680, 685 (S.D. W. Va. 2000).

This case therefore presents none of this Court's usual criteria for certiorari. It is not in an area of unsettled law and the Court of Appeals ruling does not conflict with the opinions of this Court or another court of appeals. S.Ct. Rule 10.

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ion supported the superior safety of D & X abortions for some women. 530 U.S. at 935. The State introduced no evidence to put these facts in genuine dispute. Pet. App. A-6.

II. NEITHER ISSUES OF STANDARD OF REVIEW NOR OF SCOPE OF RELIEF WARRANT GRANTING THE PETITION.

The State argues that the Court should grant the petition to resolve a "conflict and confusion among the circuits" on the proper standard to apply in determining whether to facially invalidate an abortion statute: whether to use the *Salerno* "no set of circumstances" test, the *Casey* "undue burden" on a "large fraction" of women test, or a third test, purportedly announced by this Court in *Stenberg*. Cert. Pet. 10-14, citing *United States v. Salerno*, 481 U.S. 739 (1987); *Planned Parenthood of S. E. Pa v. Casey*, 505 U.S. 833 (1992). However, any confusion on this point was resolved by this Court in *Planned Parenthood of Northern New England v. Ayotte*.

When a statute restricting abortion lacks a constitutionally required health exception, as does the Missouri Act, the issue is one of scope of relief, that is, whether more limited relief than facial invalidation of the entire statute is possible or appropriate. *Ayotte*, 126 S. Ct. at 967. The "touchstone" of resolving that issue is legislative intent—"for a court cannot 'use its remedial powers to circumvent the intent of the legislature.' " *Id.* at 968, citing *Califano v. Westcott*, 443 U.S. 76, 94 (1979) (Powell, J. concurring in part and dissenting in part). However, the courts must be wary of curing constitutional defects, lest legislatures "rely on our intervention," for " '[i]t would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside' to announce to whom the statute may be applied." *Ayotte*, 126 S. Ct. at 968, citing *United States v. Reese*, 92 U.S. 214, 221 (1875). For "this would, to some extent, substitute the judicial for the legislative depart-

ment of the government." *Ayotte*, 126 S. Ct. at 968, citing *Reese*, 92 U.S. at 221. Hence, there is no unsettled issue of law to be decided on the standard of review question.

Moreover, there is no issue to be decided on the application of the *Ayotte* ruling to this case. Federal courts must defer to state courts on the construction of state statutes, *Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. 70, 76 (2000); *Leavitt v. Jane L.*, 518 U.S. 137, 139 (1996), and the Missouri Court of Appeals has already construed the Act in a manner that forecloses the limited relief envisioned in *Ayotte*.

The Missouri Court of Appeals rejected the State's contention that section 8 of the Act, which states that the Act does not "exclude the defenses otherwise available to any person under the law . . . ," includes a defense for doctors who provide a health-preserving abortion otherwise banned by the Act. Mo. Rev. Stat. § 565.300.8 (2000). The Court ruled that insertion of such a defense would be contrary to the legislative intent to exempt only life-preserving abortions from the scope of the Act and that Missouri Courts "will not add exceptions or exclusions beyond those explicitly provided by the legislature." Pet. App. A-25. Insertion of such a defense, the Court ruled, would involve it in the task of "statutory revision, a matter within the exclusive province of the General Assembly" and present the very danger this Court cautioned against in *Ayotte*: allowing the legislature to "set a net large enough to catch all possible offenders, and leav[ing] it to the courts to step inside and say who could be rightfully detained and who should be set at large." Pet. App. A-28 (quotations marks and citation omitted).

Since the Missouri Court of Appeals decision forecloses reading a health exception into the Act, it like-

wise forecloses enjoining the Act only in situations where a procedure is necessary for the woman's health, as that relief works the same result. Therefore, the federal Court of Appeals correctly held the Act unconstitutional on its face.

CONCLUSION

For all the foregoing reasons, this Court should deny the petition.

Respectfully submitted,

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